(1)

No. 91-616

IN THE

Supreme Court of the United States

October Term 1991

STANLEY DILLER,

Petitioner,

v.

SELVIN & WEINER and
ROBINSON, ROBINSON & PHILLIPS, INC.
and
DOROTHY DILLER,

Respondents.

Petition for Writ of Certiorari to the Second Appellate District Court of Appeal of the State of California

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether parties in a divorce proceeding who contest their trial lawyers' application for more than three million dollars in fees and expenses have a Due Process right to be represented by retained counsel, who can cross-examine, present evidence, and argue the merits of their challenge to their trial lawyers' fee application.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES: Page

Page

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OPINIONS BELOW

The California Supreme Court's denial of the Petition for Review (App. A, p. 1a, *infra*), is not reported. The decision of the Second Appellate District Court of Appeal (App. B, pp. 3a-20a, *infra*) is also not reported.

JURISDICTION

The decision of the District Court of Appeal was issued on May 3, 1991. A timely petition for rehearing was denied on May 31, 1991. A timely Petition for Review filed with the Supreme Court of California was denied on July 17, 1991. The jurisdiction of this Court rests on 28 U.S.C. § 1257.

STATEMENT

1. Divorce Proceedings Begin.

Stanley and Dorothy Diller were parties to a divorce proceeding that began with a petition for divorce filed by Dorothy in 1984. Husband and wife were initially represented by counsel whom each retained and paid. Less than two weeks before a trial scheduled for May 1986, Dorothy hired the firm of Selvin & Weiner to replace her previous lawyer. On the eve of a scheduled trial, a continuance was granted on Selvin & Weiner's request for additional discovery (R.T. 33-F)[1].

2. A New Lawyer Enters.

While the trial was continued, Stanley Diller retained Robinson, Robinson & Phillips as additional counsel, and the Robinson firm became Stanley's lead counsel in February 1987 (R.T. 555). The trial began in August 1987, and conflicts between each of the parties and his or her counsel soon became obvious. Mr. Weiner indicated on the first day of trial that his client, Dorothy Diller, no longer had confidence in him (R.T. 701-02). In September 1987, Mr. Robinson requested leave to withdraw as Stanley Diller's counsel (R.T. 1634).

3. The Court Holds Counsel in the Case.

The trial judge insisted that trial counsel remain in the case, although he stated on the record that he was aware of conflicts between the parties and their counsel (R.T. 701-02, 1710). In October 1987, the parties, based upon the requests of the trial judge and the advice of their respective counsel, signed a stipulation designed to shorten the trial. With regard to attorneys' fees it provided:

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[1] "R.T." indicates the pages of the record prepared for the California Court of Appeal.

> 25. The Court will receive testimony and other evidence concerning attorneys' fees and litigation costs, the reasonable value thereof, the necessity thereof, the evaluation thereof, and the assessment, if any to either party, their respective attorneys and/or to the community. The court will permit each side one and one-half (1½) days on this issue after depositions have been taken of Weiner and Robinson (not to exceed three (3) hours each) and appropriate documentation has been filed setting forth the direct testimony of each attorney in connection with such claims for attorneys' fees and costs. The bulk of the court testimony is contemplated as cross examination of a particular declarant.

4. The Trial Lawyers Request Interim Fees.

In early December 1987, the trial attorneys submitted an order restraining husband and wife from transferring or disposing of community property valued at approximately $850,000 (R.T. 429). Thereafter, at a session from which Stanley Diller was absent, his trial lawyer requested an award of interim fees, claiming that he had accumulated $853,667 in fees and approximately $200,000 in costs and had been paid only $125,000 to that date (R.T. 4353-54).[2] Dorothy's attorney asked that he, too, be granted interim fees, claiming that there was a balance due him of $862,724 in fees and $51,837 in costs — in addition to the $610,000 that Dorothy had paid him prior to that date (R.T. 4363).

---

[2]Stanley Diller asserts that, when initially retained, his trial lawyer said that he would accept approximately $125,000 as the complete fee for representing Mr. Diller in the entire proceeding.

5. Husband and Wife Hire Separate Counsel.

Dorothy retained separate counsel, Ed Saul, Esq., to represent her for purposes of the attorneys' interim fees claim. The trial judge stated on December 4, in open court (R.T. 4377-78):

> I have ordered declarations in this case, subject to cross-examination by these lawyers, plus you [Mr. Saul] plus a lawyer — another lawyer, if Mr. Diller wants to hire him or her.

6. Husband Challenges the Fee Requests.

Immediately upon learning of the interim fee requests, Stanley Diller complained to the court about the exorbitant fees being requested by the lawyers for both sides. On December 7, Mr. Diller stated in open court (R.T. 4389-90)

> [T]hese legal fees, needless to say, are way, way out of line, so excessive — I've been in business for 30 years. I've dealt with many, many lawyers. I've been through tremendous big transactions.
>
> I've never experienced such legal fees, and I think it started with Mr. Weiner, and everybody wanted to follow his footsteps. He gave a pre[cedent] of going up with these outrageous legal fees which is not my business to say here —
>
> ***
>
> Your Honor, I appreciate the opportunity, but I do believe, you see, that when it comes to such high legal fees that I do believe some attorneys who are experienced in checking out legal fees should check out and see if they're correct.

Shortly thereafter, Mr. Diller retained separate counsel, Ronald Anteau, Esq., to contest the attorneys' fee requests.

7. The Court Awards Interim Fees.

After hearing briefly from the parties' new counsel, the trial judge awarded interim fees and expenses of $575,000 to the Robinson firm and $483,239 to Selvin & Weiner without any prior discovery or cross-examination on the reasonableness or factual basis for the attorneys' fees (R.T. 4668-69). The judge reserved jurisdiction, however, "to determine the reasonable value of attorneys' fees and costs" (*id.*) The interim fee awards were paid, for the most part, from the $850,000 in assets that had previously been frozen by the court at the joint request of the trial lawyers.

8. The Trial Ends.

Trial testimony concluded on December 17, 1987, and the trial judge announced that final declarations for attorneys' fees and costs would have to be filed by January 4, 1988. He stated that a day of hearing would be required "for examination of anybody by Weiner, Saul, Robinson, and Anteau" (R.T. 4926).

9. The Husband's and Wife's Lawyers Are Barred.

A hearing was scheduled for January 8, 1988, on the attorneys' fee applications. The judge denied written objections filed by separate counsel for the husband and wife to the interim award and declared, for the first time (R.T. 4931):

> The court does not intend to permit Mr. Saul or Mr. Anteau to participate in this proceeding concerning attorneys' fees.

The trial judge described the issues as being "[w]hat are the petitioner's attorney fees and who should pay them? And

what are the respondent's attorneys' fees and who should pay them?" (R.T. 4932). He then refused again to hear from Dorothy's counsel, Mr. Saul, and stated that he saw "no reason" for Mr. Saul and Mr. Anteau to remain in the courtroom, and they were asked to leave (R.T. 4933).

Stanley Diller personally requested a continuance so that the attorneys' time sheets could be produced. His trial lawyer communicated this message to the court as an "accommodation" to Mr. Diller and stated his personal opinion that the requested information was unnecessary. The judge said he accepted the time representations made by counsel for both husband and wife and would decide only whether "they [the trial attorneys] should have spent that time" (R.T. 4937).

10. Friendly Trial Counsel Question Each Other.

The trial lawyers then took the stand and were "cross-examined" in friendly fashion by each other. Neither was asked to produce time records or justify the thousands of hours that each reported had been spent by his law firm on this litigation (R.T. 4939-66). The entire testimony of Messrs. Weiner and Robinson concerning their $3 million fee requests covered only eighteen pages of the trial transcript.

11. The Judge Again Silences the Lawyers.

At the conclusion of the hearing on January 8, 1988, the trial judge announced that he would hear closing arguments on the entire case on January 15. He added, however, "I will not permit either Saul or Mr. Anteau to argue. As far as I am concerned, their work is done" (R.T. 5036). In closing argument, neither party's trial lawyer questioned the fees requested by the other (R.T. 5042-5120).

12. Each Trial Lawyer Gets Every Penny He Asks.

In the court's final order, the trial lawyers were granted every penny they requested. The judge's decision, filed on April 11, 1988, recited, in conclusory terms, that the fees of both firms were "fair, reasonably necessary, fair and proper." The judge awarded, as of that date, a total of $1,768,791 as fees and expenses to Selvin & Weiner and $1,238,257 to Robinson, Robinson & Phillips, plus ten percent interest per annum on all outstanding amounts. He ordered that each party's obligation to his or her lawyer be paid out of the community assets. The awards to the attorneys constituted nearly 30 percent of the husband and wife's then remaining community assets.

13. The Court of Appeals Affirms.

Stanley and Dorothy both appealed to the Second Appellate District Court of Appeal. They challenged the trial court's refusal to allow them to be represented by counsel of their own choosing in connection with the final fee petitions. Each argued that the court's bar violated the Due Process Clause of the Fourteenth Amendment and the California Constitution. On May 3, 1991, the Court of Appeal issued a decision upholding, in its entirety, the trial court's award of fees and costs to the attorneys. The Court of Appeal stated that if the Dillers' argument were adopted, it would "establish a rule that in every dissolution action where attorney fees and costs are in issue there would be a trial within the trial requiring additional counsel to cross-examine the trial counsel regarding his or her attorney fees and that an attorney would always have a conflict with his client when the court is asked to set and allocate attorney fees" (p. 16a, *infra*). Petitions for rehearing filed by both parties were denied on May 31, 1991. On July 17, 1991, the Supreme Court of California denied separate petitions for review filed by Stanley Diller and Dorothy Diller.

REASONS FOR GRANTING THE WRIT

California is among seven States that permit judges in matrimonial actions to award attorneys' fees to trial lawyers without giving the party who must pay the fees an opportunity to be represented by separate counsel who might cross-examine the trial lawyer, as well as introduce evidence and argue in opposition to his fee request. In this case, the California rule means that husband and wife must together pay in excess of three million dollars in contested legal fees and expenses, having had no opportunity whatever to challenge their trial lawyers' fee requests and to make a record that could be reviewed in a higher court. The procedure sanctioned by California and at least six other States conflicts with the minimal due process requirements of the Fourteenth Amendment. At least eight States disagree with the California rule and have recognized in judicial decisions that a party to a matrimonial action, like any other party in litigation, is entitled to be heard in court through retained counsel and to present evidence and argument to contest his or her trial lawyer's fee application.

1. California's Practice Conflicts With Constitutional Principles Articulated by This Court

In *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932), this Court said:

> What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. . . .
>
> . . . If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal

> would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

There is no more basic constitutional right than the right to be heard through retained counsel in any matter before a judicial tribunal that affects one's life, liberty, or property. This Court reaffirmed that right in *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972), declaring that the right to be heard " 'must be granted at a meaningful time and in a meaningful manner','' *quoting Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *see Connecticut v. Doehr*, 111 S. Ct. 2105, 2112 (1991). By refusing to permit the specially retained attorneys of Stanley and Dorothy Diller to appear on behalf of their clients in an adversary capacity vis-a-vis the Dillers' trial lawyers, the California courts denied the Dillers the legal assistance to ''delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests'' of parties in litigation. *Goldberg v. Kelly*, 397 U.S. 254, 270-71 (1970).

The Court of Appeal rejected the constitutional claim on the ground that such a precedent would require ''a trial within the trial'' whenever, in a divorce proceeding, attorneys' fees are in issue. But that is an inadequate ground for denying a fundamental constitutional right. The Dillers should not be deprived of three million dollars — even on the application of their own trial lawyers — without being given an opportunity to contest the requested fees.

The parties' trial lawyers were not their advocates in challenging their own fee requests. Stanley Diller's trial lawyer had no real interest to test the validity or reasonableness of the fees requested by Dorothy Diller's trial lawyer, and Dorothy Diller's trial lawyer had no motive to challenge Stanley Diller's counsel. The *only* means of securing a truly adversary proceeding was to permit each client to contest his or her

own lawyer.[3] Yet the trial judge prevented such a clash by excluding the lawyers who had been separately retained by husband and wife to fight the trial lawyers' extraordinarily large demand for fees.

2. This Court Should Resolve the Constitutional Conflict Among the States.

The conflicting attitudes of state courts to the rights of parties in divorce cases to challenge their own trial lawyers' requests for fees is illustrated by comparing the present case with *Sadofsky v. Sadofsky*, 78 A.D.2d 520, 431 N.Y.S.2d 594 (2d Dep't. 1980), a New York case which reached the contrary result. In *Sadofsky*, the wife's trial lawyer applied for a fee after the parties had agreed to settle the divorce action and the judge said he would rule on counsel fees. As in this case, the husband and wife retained a new lawyer to challenge the trial lawyer's fee. The judge refused to hold a hearing and awarded a fee to the trial lawyer.

The New York appellate court reversed on the ground that the husband (who was to pay the fee) "was entitled to an evidentiary hearing so that the extent and value of respondent's services could have been scrutinized in an adversarial context by the trial court and intelligently reviewed by this one." 431 N.Y.S.2d at 595.

The California rule is that there is no right to an adversary

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[3]Had Stanley Diller been given an opportunity to be heard in opposition to his trial lawyer's enormous claim for attorneys' fees, he would have been able to show that much of the time spent — assuming all the time was adequately documented — was unnecessary. The trial lawyers acknowledged several times during the proceedings that no real benefit had resulted from the discovery conducted during thefifteen-month continuance of the trial. The clients were entitled to prove, as they were prepared to do, that the fees were escalated and magnified by unnecessary and unjustifiable makework.

evidentiary hearing before a trial court determines counsel fees on a contested fee application. It has been applied in a number of California cases, and was approved by the California Supreme Court in *Lipka v. Lipka*, 60 Cal. 2d 472 386 P.2d 671 (1963). Other States that appear to follow this rule are the District of Columbia (*Nolan v. Nolan*, 568 A.2d 479 (D.C. App. 1990)), Indiana (*Stigall v. Stigall*, 151 Ind. App. 26, 277 N.E.2d 802 (1972); *Burkhart v. Burkhart*, 169 Ind. App. 588, 349 N.E.2d 707 (1976)), Minnesota (*Moberg v. Moberg*, 350 N.W.2d 421 (Minn. App. 1984)), Pennsylvania (*Young v. Young*, 274 Pa. Super. 298, 418 A.2d 415 (1980)), and Utah (*Porco v. Porco*, 752 P.2d 365 (Utah App. 1988)).

The New York rule illustrated by the *Sadofsky* case has been applied in other New York decisions. *See, e.g., Tarpinian v. Tarpinian*, 160 A.D.2d 1063, 553 N.Y.S.2d 546 (3d Dep't 1990); *Huntington v. Huntington*, 139 A.D.2d 493, 526 N.Y.S.2d 596 (2d Dep't 1988); *Johnston v. Johnston*, 115 A.D.2d 520, 496 N.Y.S.2d 50 (2d Dep't 1985). States that have followed the New York rule include Arizona (*Russo v. Russo*, 80 Ariz. 365, 298 P.2d 174 (1956)), Colorado (*In re Marriage of Kiefer*, 738 P.2d 54 (Colo. App. 1987)), New Jersey (*Mayer v. Mayer*, 180 N.J. Super. 164, 434 A.2d 614, *petition for certification denied*, 88 N.J. 494, 443 A.2d 709 (1981)), Oklahoma (*Mastromonaco v. Mastromonaco*, 751 P.2d 1106 (Okla. App. 1988)), Oregon (*In the Matter of Whitlow and Whitlow*, 79 Or. App. 555, 719 P.2d 1308 (1986)), and South Dakota (*Brennan v. Brennan*, 88 S.D. 541, 224 N.W.2d 192 (1974)).

In *Santee v. North*, 223 Kan. 171, 574 P.2d 191 (1977), the Kansas Supreme Court articulated the constitutional principle that, in our view, should govern this situation and should have been applied by the California courts (574 P.2d at 193);

> The right to examine and cross-examine witnesses

> testifying at any judicial or quasi-judicial hearing is an important requirement of due process . . . .
>
> . . . Should it be any different when a lawyer sues a layman for a fee? We believe not and even though the amount of the fee allowed was adequately supported by evidence and statements of appellee's counsel the appellant should have been afforded the right to cross-examine and introduce what evidence he might have bearing on the reasonableness of the fee sought.

3. The Constitutional Issue Affects Many Cases.

The reported decisions on this subject are just the tip of the iceberg. Most of them involve applications for attorneys' fees that are relatively small. Parties subject to such orders are frequently unable or unwilling to appeal. Whether a contesting party is given a fair opportunity to challenge the size of a trial attorney's fee after a contested divorce is an issue that affects thousands of matrimonial cases on dockets across the country. Even a cursory review of the reported decisions discloses that there are differences between neighboring jurisdictions — not to speak of the difference between California and New York — over the protections that the Constitution affords in these circumstances.

This case is a particularly startling example of the gross inequity that results under the California rule. Attorneys who have claimed more than three million dollars in fees and expenses have been granted every penny they ask *with no adversary inquiry whatever*. The Due Process Clause of the Fourteenth Amendment is infringed by such a procedure.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 1991

APPENDIX A

Second Appellate District, Division Seven, No. B035205
S021450

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

DOROTHY DILLER, Appellant

v.

STANLEY Z. DILLER, Appellant

Petitions for review DENIED.

LUCAS
Chief Justice

APPENDIX B

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
ROBERT N. WILSON, CLERK

DIVISION: 7 DATE: 05/31/91

Edward J. Horowitz
11661 San Vicente Blvd.
Suite 1015
Los Angeles, CA 90049

RE: Diller, Dorothy
vs.
Diller, Stanley Z.
Selvin & Weiner
2 Civil B035205
Los Angeles No. D118626

THE COURT:

PETITIONS FOR REHEARING ARE DENIED.

APPENDIX C

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

No. B035205

(Super. Ct. No. D118626)

In re the Marriage of Diller

DOROTHY DILLER,

Appellant,

and

STANLEY Z. DILLER,

Appellant,

SELVIN & WEINER, a Professional Corporation,

Respondent,

and

ROBINSON, ROBINSON & PHILLIPS, INC.,

Respondent.

APPEAL from an order for attorneys fees and costs as part of a Further Judgment on Reserved Issues of the Superior Court of Los Angeles County. Judge Robert F. Fainer, Judge. Affirmed.

APPEAL by appellant/petitioner, Dorothy Diller from Further Judgment on Reserved Issues entered April 11, 1988 awarding her trial attorneys Selvin and Weiner attorneys fees and costs payable from the community property of the parties.

APPEAL by appellant/respondent, Stanley Diller from Further Judgment on Reserved Issues entered April 11,

1988 awarding his trial attorneys, Robinson, Robinson and Phillips attorney fees and costs payable from the community property of the parties.

Goldfarb, Sturman, Averbach & Sturman and Martin B. Snyder, attorneys for appellant Dorothy Diller.

Edward J. Horowitz, A Professional Corporation, attorney for appellant Stanley Diller.

Selvin, Weiner & Ruben, and W. Ruel Walker, A Partnership Including Professional Corporations, attorneys for respondent Selvin & Weiner.

Carlsmith, Ball, Wichman, Murray, Case, Mukai & Ichiki, and Clark Heggeness, Joseph D. Mullender, Jr. attorneys for respondent Robinson, Robinson & Phillips.

INTRODUCTION

The parties were married on December 18, 1955 and separated on May 1, 1984, petitioner Dorothy Diller filed a petition for dissolution of marriage on June 7, 1984. The parties had accumulated assets valued in excess of $40,000,000, which after allowances for liabilities left the parties with net community assets valued between ten and fifteen million dollars. A Judgment of Dissolution of the marriage was filed on November 26, 1985 as to the status of the marriage only, all other issues were reserved for further hearing. The trial on the reserved issues was assigned to Judge Robert Fainer on May 19, 1986 and was trailed until August 10, 1987 when actual testimony commenced. The trial, with interruptions encompassed forty-nine days of testimony through December 17, 1987.

On December 4, 1987 motions were made by counsel for petitioner and respondent for an order for payment of interim attorney fees and costs. Each attorney had re-

ceived some fees and costs from their clients or by court order prior to this date, however, due to the nature of the litigation substantial fees and costs had accrued and been incurred which the respective attorneys had not been paid.

On December 14, 1987 Judge Fainer made an order for payment of interim fees and costs as follows: "The court orders interim fees to Mr. Weiner (attorney for petitioner) in the amount of $431,362.00 plus $51,877.00 costs paid out of the community funds and to Mr. Robinson (attorney for respondent). The amount of $425,000.00 interim fees plus $90,000.00 costs paid out of community funds. Additional fees will be decided when the case is over."

At the conclusion of the trial and after oral and written argument the court took the case under submission on January 15, 1988 and issued a Statement of Decision and Further Judgment on Reserved Issues on April 15, 1988. The court found the reasonable value of the services rendered and costs advanced by petitioner's counsel to be the sum of $1,719,347.73 through January 31, 1988 plus $49,444.00 for services and costs advanced after January 31, 1988 to the date of the entry of Further Judgment on Reserved Issues.

The court found the reasonable value of the services rendered and costs advanced by respondent's counsel to be the sum of $1,216,607.23 through February 22, 1988 plus $21,650.00 for services performed after February 22, 1988 to the date of the entry of Further Judgment. The court gave each party credit for fees and costs previously received by their counsel and deducted the amounts ordered pursuant to the interim order of December 14, 1987 and ordered that the balance due to each attorney after all credits be paid directly to the attorneys from the liquid community property of petitioner and respondent. The amount payable to Selvin and Weiner being $785,742.00 and to Robinson, Robinson and Phillips $680,525.00.

Both parties appealed the Judgment on Reserved Issues of April 11, 1988 insofar as the judgment awarded attorney fees to their respective counsel.

ISSUES

1. Did the court have jurisdiction to make its interim order for attorney fees and costs on December 14, 1987?

2. Did the court have jurisdiction to make a final order for attorney fees and costs in its Further Judgment on Reserved Issues entered April 11, 1988?

3. Were the attorney fees and costs necessary to the litigation and reasonable in the amounts found by the court?

4. Were the parties afforded sufficient due process of law to present evidence to challenge the reasonableness and necessity of the attorney fees and costs made in the Judgment on Reserved Issues of April 11, 1988.

FACTS

The long journey from the filing of the petition for dissolution to the entry of Judgment on Reserved Issues took 3 years and 10 months, during this period of time the parties engaged in a continuous legal battle in which neither party would concede any issue, even those of a minor nature, and demanded that their attorneys litigate each issue to the fullest. The original Order to Show Cause required thirteen days of testimony, the actual trial lasted forty-nine days. The court reporter's transcript consisted of twenty volumes for a total of 5165 pages. There were a total of 110 separate court appearances, dozens of hearings of motions filed by the parties 85 depositions and thousands of pages of exhibits. There were nineteen days of reference proceedings and it was necessary for the trial judge to write an 87 page Statement of Decision. The Judgment on Reserved Issues constituted 57 pages.

During the course of the litigation the court on several occasions called to the attention of the parties that due to their inability to resolve their differences and their insistence on litigating each minor issue that the attorney fees were escalating and would be in excess of $1,000,000. No amount of advice from the judge deterred the parties from their obsession to grind on with the litigation, without concern as to its costs or consumption of time.

Near the conclusion of the trial when evidence was being presented regarding attorney fees and costs, with the concurrence of the trial judge each party consulted additional counsel to advise them with regard to the issues of assessment and allocation of attorney fees and costs.

DISCUSSION

The court had jurisdiction to make its interim and final order for payment of attorney fees and costs from the community property.

In order to exercise some control over litigation which was becoming increasingly time consuming and expensive and unlikely to result in a settlement, the court met with the attorneys to set guidelines and limits regarding trial of the case. These discussions resulted in the signing and filing on October 19, 1987 of a document entitled "Consent, Waiver and Stipulation re Abbreviated Trial, etc. and Order". This document was signed by petitioner, respondent and their respective counsel. Based upon the stipulations the court signed the following order:

> "The court is satisfied that the respective parties are aware of and understand the provisions, the advantages and disadvantages of their Consent, Waiver and Stipulation, and have entered into and consented to this Agreement freely, without coercion, duress or undue influence, with full advice of independent counsel other than their respective counsel of record, with awareness and knowledge of their rights to a full trial and knowledge and understanding of this abbreviated trial procedure.

"The waiver, consent and stipulation is accepted by the court and it is hereby *ORDERED* that the trial continue forthwith in conformity with this abbreviated trial procedure described in the Consent, Waiver and Stipulation."

Prior to entering into the stipulation setting forth the procedure to shorten the trial each party discussed the proposed stipulation with counsel other than their trial counsel and had ample opportunity to clarify, change or reject the agreement. The signed document states as follows:

"Both petitioner and respondent have consulted with counsel independent of their respective trial attorneys as to the wisdom and ramifications of entering into this stipulation, and based upon such consultation, each hereby agrees that he and she have read and understood this stipulation and the benefits and risks of the procedure contemplated and outlined herein, and that each further waives his or her respective rights to object to the abbreviated trial procedure as set forth herein."

Paragraph 25 established the procedure for determination of attorney fees, each counsel was to file documentation with the court setting forth their respective claims for attorney fees subject to cross-examination by the other counsel.

Paragraph 25 "The court will receive testimony and other evidence concerning attorneys' fees and litigation costs, the reasonable value thereof, the necessity thereof, the evaluation thereof, and the assessment, if any, to either party, their respective attorneys and/or to the community. The court will permit each side one and one-half (1½) days on this issue after depositions have been taken of Weiner and Robinson (not to exceed three (3) hours each) and appropriate documentation has been filed setting forth the direct

testimony of each attorney in connection with such claims for attorneys' fees and costs. The bulk of the court testimony is contemplated as cross examination of a particular declarant."

Notwithstanding any other legal basis the judge had for setting and assessing attorneys fees, the parties specifically conferred upon the court by their stipulations the jurisdiction to determine the necessity of the legal services and the reasonable value thereof, against whom the fees would be assessed or if the fees would be assessed against the community property.

The conduct of the parties throughout the litigation necessitated the court to control the proceedings so that the matter could be concluded within a reasonable period of time. If a trial could go on forever, this trial would have been a candidate for that dire distinction had not the trial judge guided and limited the proceedings. On various occasions during the time that Judge Fainer presided over this matter he discussed with the parties, advised and warned them of the escalating attorneys fees being incurred. The parties throughout the proceedings were hostile and bitter towards each other and demanded that their attorneys litigate minor issues resulting in unwise expediture of the attorneys and court's time.

The experienced trial judge in this case who had the opportunity to observe the parties over a period of forty-nine days of trial and numerous motions and conferences set forth in his Statement of Decision his impression of the parties which help explain the large legal fees and costs of which the petitioner and respondent now complain.

Page 5. "The trial and attitude of the parties created great difficulties for the lawyers both in trying the action and in preparing for trial."

"There has been an unreasonable expenditure of court time and lawyer time on both sides, as well as

court appointed referee time, during the trial and during trial preparation, particularly in the period after the action was assigned to Dept. 19 for trial on 5/19/86 because of the evasive, contentious attitude of the parties."

"The personalities of the petitioner, the respondent and the claimants as well as their attitude towards each other and the litigation process . . . explain and justify the substantial time spent by the lawyers."

Page 6. "The petitioner . . . was obsessed with her beliefs and claims . . . that respondent was concealing community property assets. She asserted unprovable claims of misconduct by respondent and pursued property issues that had minimal value. . . ."

"The petitioner throughout the trial was a frightened bitter woman."

"The respondent is an avaricious, covetous, stubborn man. During the course of the trial Mr. Diller was evasive, unco-operative, distrustful, discourteous, unyielding and self righteous and was a manipulative litigant."

Page 7. "The parties exerted unreasonable and excess pressure on their lawyers."

"The respondent had almost daily disputes with his lawyers, indicating Mr. Diller's paranoia about the trial evidence and the significance of some of the trial evidence."

"While many of the petitioner's claims were unprovable and unrealistic, it was respondent, in his attempts to control, to dominate, and even to obstruct the trial preparation and the trial proceedings that caused the most notable and unreasonable delays and consumption of trial and lawyer time."

Page 8. "The time spent in document production and in discovery was exacerbated by the evasiveness, the

hostility and the uncontrolled contentiousness of Mr. Diller."

"The contributions of each to the length of the trial are too intertwined to be susceptible of division."

"The venality and the unrelenting, bitter belligerency of the parties made trial preparation and trial presentation difficult, oppressive and frustrating for the parties themselves, for their lawyers and for the court."

Page 10. "The hard realities of this unhappy case are that it was impossible to ever be ready for trial because neither party was ever going to accept any decision or solution to the distribution of property but their very own."

"The court notes that both Mr. Weiner and Mr. Robinson throughout the trial attempted to narrow the issues and reduce the trial in the face of objections by their respective clients."

In addition to the parties stipulating to the jurisdiction of the court to set attorney fees, both parties in their respective Petitions for Dissolution specifically requested the court to set, assess and allocate attorney fees. Additionally sections 4370 and 4370.5 of the California Civil Code provides the legislative basis for attorney fees in family law matters.[1]

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[1] "§ 4370. Costs and attorneys fees pendente lite; attorneys fees for enforcement of support order

"(a) During the pendency of any proceeding under this part, the court may order any party, except a governmental entity, to pay such amount as may be reasonably necessary for the cost of maintaining or defending the proceeding and for attorneys' fees; and from time to time and before entry of judgment, the court may augment or modify the original award for costs and attorneys' fees as may be reasonably necessary for the prosecution or defense of the proceeding or any proceed-

The court after hearing all of the evidence found that both counsel had rendered their professional services with the same expertise, care and skill ordinarily and usually used in family law actions in the Central District of the Superior Court of Los Angeles County. There is nothing in the record to indicate otherwise. The court further found that the fees and costs reimbursements were reasonable, proper and necessary.

On December 4, 1987 during the trial on reserved issues, counsel for respondent, Robinson, Robinson and Phillips made an oral motion for interim attorney fees

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ing related thereto, including after any appeal has been concluded. . . .

"(b) During the pendency of any proceeding under this part, an application for a temporary order making, augmenting, or modifying an award of attorneys' fees or costs or both shall be made by motion on notice or by an order to show cause, except that it may be made without notice by an oral motion in open court *in either of the following cases*:

"(1) At the time of the hearing of the cause on the merits . . .

"§ 4370.5. Justness an reasonableness of award by court; considerations; order of payment

"(a) The court may make an award under this chapter where the making of the award, and the amount of the award, is just and reasonable under the circumstances of the respective parties.

"(b) In determining what is just and reasonable under the circumstances, the court shall take into consideration both of the following:

"(1) The need for the award to enable each party, to the extent practical, to have sufficient financial resources to adequately present his or her case, taking into consideration to the extent relevant the circumstances of the respective parties described in subdivision (a) of Section 4801.

" . . . .

"(c) The court may order payment of the award from any type of property, whether community or separate, principal or income."

and costs. This motion was not opposed by petitioner's counsel Selvin and Weiner, who made their own motion for interim fees and costs. Both parties in their appeal urge that the court lacked jurisdiction to order interim fees and costs, however, a review of the court file indicates that petitioner in sixteen separate documents filed with the court requested interim fees and filed four specific Orders to Show Cause requesting interim fees, final fees and costs on June 7, 1984, February 25, 1985, December 16, 1985 and April 13, 1987. In the April 13, 1987 Order to Show Cause she requested $567,835.65 attorney fees and $33,082.94 in costs. Respondent, husband filed multiple documents with the court in response to the Order to Show Causes by petitioner in which he requested interim fees, final fees and costs against petitioner.

In arriving at its determination setting attorney fees the court had before it numerous and lengthy declarations and financial documents filed in a period of four years. There was ample evidence before the court upon which it could base an attorney fee order. On December 10, 1987 petitioner's counsel filed a declaration and exhibits regarding attorney fees constituting 439 pages which was supplemented on January 4, 1988 with an additional 304 pages. Respondent's counsel filed a declaration and exhibits documenting his attorney fees which constituted 123 pages. In the four years prior to December 1987 the parties filed declarations and exhibits directed towards attorney fees which involved several hundred pages.

The parties having acted unwisely during the entire course of the litigation had incurred substantial fees and costs due to their respective attorneys which were mostly unpaid in December 1987. The attorneys had carried the cost of the litigation and were financially hurting and not receiving funds from their clients in that court ordered restraining orders tied up the community

assets and neither party had separate funds to pay attorney fees. Realizing the court was about to order the payment of the majority of the attorney fees incurred to date, after three days of hearings on attorney fees and costs December 2, December 3 and December 4, 1987 the parties without their counsel signed a petition on December 6, 1987 in which the husband and wife agreed to pay their own attorney fees and resolving other issues thus withdrawing the issue of attorney fees from the court.

The stipulation was presented to the court on December 10, 1987 after another two days of testimony regarding attorney fees. This stipulation, if valid, would have required counsel to bring an independent action against their clients in separate lawsuits for attorney fees which would have delayed payment of attorney fees for several years.

On December 10, 1987 the court advised the wife that he considered the stipulation unfair to her and suggested she consult an independent counsel whom she had previously consulted regarding the August 1987 stipulation and attorney fees. On December 11, 1987 the petitioner renounced her signature to the stipulation and the stipulation was withdrawn. The court on December 14, 1987 ordered payment of interim attorney fees and costs.

In the case of *In re Marriage of Hatch* (1985) 169 Cal.App.3d 1213, 1218, 1221, the wife applied to the court for an interim attorney fee order which the trial court denied stating the court did not grant interim fee orders. The wife in order to prepare her case required an actuary and an appraiser, and did not have funds to pay her attorney. The appeals court ordered interim attorney fees to the wife stating:

> "The public policy of California strongly favors settlement as the primary means of resolving legal disputes. . . . This result can most easily and most rapidly be reached where each spouse has reasonable

and able counsel representing them with some assurance they will be fairly compensated for their services consistent with the financial circumstances of the parties."

The court further stated:

"Unfortunately it is often true that the financial circumstances of spouses at the breakup of marriages do not permit timely payment of counsel for services as they are rendered and, in fact, counsel for financially disadvantaged spouses rarely receive final payment until long after the litigation is over. However, the courts should not make a bad situation worse. The suggestion of the trial court that attorneys handling marital dissolution cases must be prepared to 'carry the client until the time of trial' is not only demeaning to attorneys handling family law cases, it fails to consider the present day realities of the economics of the practice of law. . . . Given the complexity of modern day family law litigation and the significance of this litigation to our society, courts should be doing everything they can to encourage, not discourage, able attorneys to handle family law cases.'

". . . The approach suggested by the trial court would . . . compel the attorney to finance the litigation by deferring receipt of payment for services until months or years after they are performed, while the attorney would have to personally advance the costs of overhead attributable to the case. Even worse, it would require attorneys to advance from their own pockets sizable expenditures required as a matter of course in such litigation, such as expense for depositions and experts. Banks and finance companies are licensed for the purpose of lending money; lawyers are not."

Judge Fainer properly ordered payment of interim attorney fees from the liquid community assets.

Consistent with their prior attempt to delay payment of attorney fees after entry of the Further Judgment on Reserved Issues, the parties again without counsel signed a new stipulation stating regardless of Further Judgment by the court;

1. Each party would bear their own attorney fees and costs.

2. Withdrawing respective pending motions for a new trial, and

3. Modifying the Further Judgment to delete any reference to attorney fees or costs. Subsequent to this stipulation both parties have filed malpractice actions against their respective counsel.

The parties were afforded due process of law to present evidence to challenge the reasonableness and necessity of the attorney fees and costs ordered by the court in the Judgment on Reserved Issues of April 11, 1988.

Petitioner and respondent both contend that the portions of the judgment they appeal from should be reversed because the trial court allegedly denied due process of law by determining the amounts of fees and costs which it awarded based upon their attorneys' written declarations and supporting documentation and without permitting them to have their independent counsel cross-examine their attorneys. To adopt this argument would establish a rule that in every dissolution action where attorney fees and costs are in issue there would be a trial within the trial requiring additional counsel to cross-examine the trial counsel regarding his or her attorney fees and that an attorney would always have a conflict with his client when the court is asked to set and allocate attorney fees.

The parties by their stipulation of October 19, 1987 conferred upon the court the jurisdiction to determine the necessity and reasonableness of the attorney fees and to allocate payment to either party or to the community.

Additionally the parties agreed that "the court will have full discretion to limit direct and cross-examination and the introduction of other evidence. . . ." This agreement was signed by both parties and their counsel. Additionally each party consulted other counsel prior to signing the stipulation.

In a similar factual situation *In re the Marriage of Berlin* (1976) 54 Cal.App.3d 547, the parties were engaged in a bitter dispute over the division of a large amount of community property. The parties arrived at a stipulation settling all issues but attorney fees and costs and stipulating to submit the issue of attorneys fees and costs to the court, and that the attorney fees would be paid out of the community property. The court awarded $10,000.00 fees to each attorney and both parties appealed. The appeals court affirmed stating, "The trial court had jurisdiction to award attorney fees to both counsel to be paid out of the community property if the parties so agreed."

The court had substantial evidence before it to determine the necessity, reasonableness and amount of the attorney fees and costs. As previously discussed the court file contained declaration and exhibits relating to the financial affairs of the parties, financial declaration and business records. These records if bound would contain enough pages to constitute several novels, although none would make the best seller list.

Many days of testimony were taken on financial matters, several days relating to attorney fees and costs only. Both trial counsel took the stand and were cross-examined by the other counsel as to attorney fees and costs. Office records were produced. On January 8, 1988 Judge Fainer decided he did not need additional evidence to determine the reasonableness and necessity of attorney fees and costs and their allocation. On January 8, 1988 the entire day was spent presenting the testimony of petitioner, respondent, attorneys and witnesses regarding the allocation of

attorney fees. Thereafter, counsel submitted written arguments to the court.

Throughout the trial each party argued that the other party should pay all of the attorney fees for both parties. The allocation of payment was argued more often and strenuously than the amounts. The court found both parties were at fault in causing the trial to far exceed the time it should take to try such a case and thus ordered all of the attorney fees and costs to be paid from the community property.

Each attorney had submitted to the court extensive bills and invoices showing the number of hours spent on the case and describing the work performed and the hourly rate.

A trial judge in a family law matter observes the parties and counsel throughout the trial and evaluates the evidences and is in the unique position to see the whole picture and all its individual parts as it is being painted. A separate proceeding introducing additional counsel on the issue of attorney fees would require additional time, result in compounding the attorney fees and further burden an already strained court system. During the trial the court is able to ascertain the time spent by counsel and the necessity of the work and the reasonable value of the attorney's services.

In *Jones v. Jones* (1955) 135 Cal.App. 52, 64, the court in affirming a trial court's awarding of attorney fees stated that direct evidence of the reasonable value of attorney fees need not be introduced.

> "Evidence as to such reasonable value of services is necessarily before the trial court when it hears a case. The trial judge, being a lawyer, can readily ascertain from the presentation of the case the approximate time spent in preparation and trial, and the relative financial circumstances of the parties. The trial court has a wide discretion in fixing the

fee, which can be upset only for an abuse of discretion."

Petitioner argued strenuously that respondent should pay all the attorney fees and costs and respondent argued that petitioner should pay all the attorney fees and costs contending her unreasonable demands caused the lengthy trial and large attorney fees and costs.

Both parties were successful in that petitioner was not required to pay respondent's fees, nor he pay hers. All of the attorney fees and costs were ordered paid out of the community property. The court exercised its discretion from its review of all of the evidence.

> "The question of the reasonableness of an order for attorney fees is addressed to the sound discretion of the trial court, and in the absence of a clear showing of abuse, not presumed but affirmatively established, its determination will not be disturbed on appeal." (*In re Marriage of Gonzales* (1976) 57 Cal. App.3d 736, 749.)

The court further stated:

> " 'A reviewing court is not authorized to revise the lower court's judgment even if it should be of the opinion that it would have made a different award had the matter been submitted to its judgment in the first instance, in the absence of a clear abuse of discretion.' 'The discretion was the trial judge's, not ours; and we can only interfere if we find that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he did.' . . . It is settled that a judge may rely upon his own experience and knowledge of the law practice, as well as on the facts and circumstances of the case as they appear from pleadings and other papers.' "

The court had jurisdiction to make both the interim order and judgment for attorney fees and costs. Although the attorney fees and costs are extremely high and this writer is concerned that they taint the quality of the system, the parties by their actions and conduct caused this aberration and under the circumstances the services performed by the attorneys was necessary and the fees and costs reasonable. The parties were afforded due process in the setting of the fees by the court.

DISPOSITION

The interim order for attorney fees and the Further Judgment on Reserved Issues is affirmed.

KALIN, J.*

We concur:

LILLIE, P.J.

WOODS (Fred), J.

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* Assigned by the Chairperson of the Judicial Council.